

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION.,

Civil Action No. 19-C-9000

MASS LITIGATION PANEL

**Alan D. Moats - Lead Presiding Judge
Derek C. Swope - Presiding Judge
Christopher J. McCarthy - Presiding Judge**

HEARING

BEFORE: The Honorable Alan D. Moats, Lead Presiding Judge, the Honorable Derek C. Swope and the Honorable Christopher J. McCarthy, Presiding Judges,, in the Kanawha County Courthouse, Ceremonial Courtroom, Charleston, Kanawha County, West Virginia, at 10:02 a.m., on the 22nd day of August, 2019.

APPEARANCES: **ANN L. HAUGHT, Deputy Attorney**
 VAUGHN T. SIZEMORE, Deputy Attorney General
 ABBY G. CUNNINGHAM, Deputy Attorney General
 Consumer Protection Division
 812 Quarrier Street, First Floor
 Charleston, West Virginia 25301
 Counsel for State of West Virginia ex rel Patrick Morrissey,
 Attorney General

Donna Miller-Mairs, Certified Court Reporter
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Exhibit C

1 order?

2 MR. SIZEMORE: In Local 391 versus Terry, it
3 made the distinction between equitable and damages,
4 damages bringing tort, equity the penalties and the
5 disgorgement, and the restitution bringing equity.

6 So those are not damage claims. They are
7 equitable relief claims.

8 JUDGE MOATS: Okay, well, I understand that,
9 but I guess that wasn't my question. My question is
10 are we nitpicking the term. Maybe it was just part of
11 an order.

12 MR. SIZEMORE: I don't believe so, Your
13 Honor. I think if you look at Trial Court Rule 2604,
14 in defining mass litigation, each of the claims
15 portend claims in law.

16 No. 1, mass accidents where people are
17 injured; two, mass courts; three, property damage,
18 mass courts; four, economic damage, mass courts or
19 economic laws like product liability case; and five is
20 nuisances or similar property damage cases such as the
21 fracking claims. All of those sound in tort, not in
22 equity.

23 The Attorney General's case is specifically
24 on equity, which will bring a myriad of problems to

1 this Mass Litigation panel.

2 For example, none of the Attorney General's
3 claims can be heard by a jury. They all must be
4 decided by the judge.

5 JUDGE MOATS: How is that a problem?

6 MR. SIZEMORE: That is a problem because
7 there is a lot of evidence that will come in for the
8 State's case that would not be admissible for the
9 political subdivisions.

10 JUDGE MOATS: Isn't that the role of the
11 judge?

12 MR. SIZEMORE: It would be, but I would
13 almost bet that before this matter goes to trial
14 Purdue Pharma will file a motion to bifurcate the
15 State's action from the political subdivision cases to
16 prevent the jury from hearing all the evidence of
17 conduct in the southern part of the state that would
18 not be admissible for the Plaintiffs or the Defendants
19 -- the Plaintiffs in the Mass Litigation panel, which
20 would defeat the whole purpose of being in front of
21 the Mass Litigation panel.

22 I have been involved in these cases for a
23 number of years. In the McKesson case, when McKesson
24 had removed the State's case to federal court and it

1 was in front of Judge Faber, it got transferred to the
2 multi-district litigation panel.

3 At the initial status conference, Judge
4 Polster sent it back down to Judge Faber because the
5 claims by the State were different from claims by
6 political subdivisions.

7 JUDGE MOATS: But I guess we understand all
8 of that, but I guess from our standpoint, why does it
9 not make sense to have all the actions, whether they
10 are identical, similar, substantially similar, all
11 heard in the same forum in this state where rulings
12 can be made where we know they are going to be
13 consistent.

14 We have had cases that have come to our Mass
15 Litigation panel. We have one pending right now, the
16 Marcellus Shale cases.

17 We have cases that we have put on different
18 tracts. We have drilling cases or wells with drill,
19 nuisance claims are brought.

20 We have cases where after the wells are
21 drilled the gas is transported downstream to
22 compressor stations, almost like little industrial
23 cities. It has nothing to do with drilling, but it
24 has to do with the complaints of the residents who

1 live around there. So that is a separate category.

2 All of those cases were sent to our Mass
3 Litigation panel, and we have them on different tracts
4 because we have similar issues involved.

5 So you look at this and it is hard to not
6 think well, it is all part of the opioid litigation.
7 Why should it be in two different courts?

8 MR. SIZEMORE: Well, Your Honor, there are a
9 couple of different reasons I would point out. First,
10 that in this case there are numerous plaintiffs and
11 several defendants.

12 Several of the defendants that are in this
13 litigation have already settled with the State.

14 Additionally, the West Virginia Board of
15 Pharmacy is also independent in this case.

16 JUDGE MOATS: Okay, let's talk about the
17 West Virginia Board of Pharmacy. You say that you are
18 assisting them in looking at pharmacy records. Well,
19 the lawsuits against them all go strictly to the
20 insurance, if there is any insurance available.

21 As I understand, it doesn't go beyond the
22 insurance policy. I think the insurance company would
23 have lawyers that are going to be defending them
24 there.

1 You say you are assisting, but how would that
2 be?

3 Are you going to Counsel of record in the
4 case?

5 MR. SIZEMORE: No, Your Honor. The
6 potential there is for me to personally become a
7 witness for the Board of Pharmacy or be called by
8 someone related to the Board of Pharmacy.

9 There was one of the articles in the Gazette
10 that was a Pulitzer prize-winning article that dealt
11 with my appearance before the Board of Pharmacy
12 offering assistance of the Attorney General's office
13 in dealing with the suspicious order reports.

14 JUDGE MOATS: Well, how would that affect
15 this case?

16 MR. SIZEMORE: It would cause me to be both
17 lawyer and counsel in the same case.

18 JUDGE MOATS: But the Board of Pharmacy, I
19 am not sure what they would have to do with you
20 against Purdue Pharma.

21 MR. SIZEMORE: In the Mass Litigation panel
22 the Board of Pharmacy would be a defendant as well as
23 the State of West Virginia as a Plaintiff. So I would
24 be a witness in the Mass Litigation panel against the

1 Board of Pharmacy or for the Board of Pharmacy,
2 hopefully neither, but that possibility is there.

3 I would also point out that in all of the
4 cases that have been before the Mass Litigation panel,
5 the Attorney General's Office has never been brought
6 into one of those cases.

7 The Attorney General -- and I believe
8 transferring the Attorney General's case to the Mass
9 Litigation panel would set a bad precedent.

10 Because Rule 26 allows for the combination of
11 two or more suits in the same circuit or multiple
12 circuits, many of the actions brought by the West
13 Virginia Attorney General under the Consumer Credit
14 Protection Act are also similar to actions brought by
15 individual plaintiffs, and the Attorney General could
16 be hauled into multiple mass litigation panels for its
17 enforcement actions.

18 JUDGE MOATS: Who are you anticipating
19 collecting civil penalties here?

20 Is this going to be on behalf of individual
21 consumers? Is it going to be on behalf of political
22 subdivisions such as cities or municipalities?

23 Is it going to be on behalf of hospitals or
24 is it going to be on behalf of individual citizens?

1 In looking at this, I am not quite
2 understanding how exactly it fits into the Consumer
3 Credit Protection Act.

4 I know the cases that have come up forces the
5 AG to do this, to collect on behalf of consumers, to
6 pay the money to consumers.

7 Is that what is going to happen here? Is it
8 going to the counties and the cities? Is it going to
9 go to the state?

10 Who are these penalties going to go to if you
11 collect them?

12 MR. SIZEMORE: The penalties would go to the
13 state and most likely the Legislature would determine
14 where it goes.

15 I would like to make a correction. The
16 Attorney General has never claimed to be representing
17 political subdivisions.

18 Legally, the Attorney General does not
19 represent political subdivisions. They are their own
20 legal entity.

21 JUDGE MOATS: What are the damages -- or not
22 damages but the set of penalties?

23 It is my understanding if you are going
24 exclusively under the Consumer Credit Protection Act--

1 and are you?

2 MR. SIZEMORE: Yes, sir.

3 JDUGE MOATS: So you can only go back four
4 years from the time that you filed the action?

5 MR. SIZEMORE: Yes, sir.

6 JUDGE MOATS: Which would be May 19, 2015?

7 MR. SIZEMORE: Yes, sir. We can also argue
8 a continuing action.

9 JUDGE MOATS: What is an individual
10 violation?

11 MR. SIZEMORE: We brought the claims under
12 UDAP, Unfair Deceptive Acts and Practices, which has a
13 dramatically different standard of proof than any of
14 the Plaintiff's claims.

15 UDAP, we do not need to prove any reliance on
16 the false misrepresentations. We do not need to prove
17 any actual damages flowing from them.

18 It is a violation of the Consumer Credit
19 Protection Act just to make a fraudulent
20 misrepresentation.

21 JUDGE MOATS: Okay, so you can get \$5,000
22 for each one of them?

23 MR. SIZEMORE: Yes, Your Honor.

24 JUDGE MOATS: How do you decide how many

1 there were?

2 MR. SIZEMORE: That is going to be up to
3 expert witnesses in discovery.

4 JUDGE MOATS: I mean, is it every time
5 somebody fills a prescription, every time some doctor
6 writes a prescription?

7 MR. SIZEMORE: We will argue that. It is
8 going to be -- it is going to be a certain -- any
9 misrepresentation -- each misrepresentation made by an
10 employee of Purdue Pharma would be a violation of
11 UDAP.

12 JUDGE MOATS: A misrepresentation to whom?

13 MR. SIZEMORE: To doctors, to pharmacists,
14 to any consumer, any of their advertisements, any of
15 their -- and this is getting much beyond the complaint
16 itself, but it would be any of those could be, and we
17 would also be arguing for disgorgement.

18 JUDGE MOATS: Why would the Attorney General
19 not try to be fighting civil penalties when we have
20 all impacted parties?

21 You say you are not trying to do that. You
22 are not trying to do it for the municipalities, the
23 counties, strictly for the State.

24 Why?

1 MR. SIZEMORE: Well, Your Honor, there have
2 been multiple lawsuits already filed in this matter.

3 JUDGE MOATS: What about those that haven't
4 been?

5 Are there any counties or cities that haven't
6 filed lawsuits?

7 MR. SIZEMORE: I don't know, Your Honor. It
8 seems like most of the counties have at least, but I
9 don't know how many cities or municipalities have or
10 have not filed them.

11 JUDGE MOATS: But again, the question is why
12 would the AG not be doing this on behalf of the entire
13 state, every entity in the state?

14 MR. SIZEMORE: And I can't answer that
15 question because I did nothing that --

16 JUDGE MOATS: Were you-all involved in a
17 case in federal court in the Eastern District in front
18 of Judge Polster?

19 MR. SIZEMORE: I am sorry?

20 JUDGE MOATS: Has the Attorney General taken
21 any position in any matter pertaining to the case
22 before the MBL in Ohio?

23 MR. SIZEMORE: Not --

24 JUDGE MOATS: Have you signed off on any

1 position paper in front of the judge?

2 I know recently the Attorney Generals were
3 arguing that the negotiation class should not be
4 violated or recognized by Judge Polster and said 23 --
5 I believe 23 AG's had signed off on it.

6 Was our state one of them?

7 MR. SIZEMORE: I believe so, Your Honor,
8 particularly because a majority of the municipalities
9 --

10 JUDGE MOATS: Why would the Attorney General
11 be doing that if you say you are not attempting to
12 collect on behalf of our entire state?

13 MR. SIZEMORE: Well, we had represented to
14 Judge Polster as well as any other court that it has
15 come up before that we do not represent the political
16 subdivisions. We don't have the Legislative authority
17 to represent legal subdivisions.

18 JUDGE MOATS: Then why would you be
19 objecting to Judge Polster recognizing any negotiating
20 class on behalf of those political subdivisions?

21 MR. SIZEMORE: Because in reviewing that
22 proposed order, it would be harmful to the State as a
23 whole and to --

24 JUDGE MOATS: Why?

1 MR. SIZEMORE: Because a majority of the
2 money would go to populous states rather than states
3 mostly impacted by this.

4 JUDGE MOATS: Okay, but you haven't sued any
5 of these people, have you?

6 The only ones I see that you have got a
7 lawsuit pending against are these defendants, the
8 Purdue Pharma Defendants.

9 MR. SIZEMORE: Correct, Your Honor.

10 JUDGE MOATS: How many entities have you
11 settled with?

12 MR. SIZEMORE: I am sorry?

13 JUDGE MOATS: How many entities have you
14 settled with?

15 MR. SIZEMORE: Twelve or thirteen.

16 JUDGE MOATS: Okay, but just how many
17 entities have been sued by the different plaintiffs
18 whether they are cities, counties? There are what, 30
19 or 40 them?

20 MR. SIZEMORE: Yes, Your Honor.

21 JUDGE MOATS: Is the AG going to sue all
22 these other entities?

23 MR. SIZEMORE: I cannot answer that
24 question.